

**DOCUMENT DISCUSS**

02061 - [A1112101]

[Protests against Responsibility Determination, Preaward Survey, Waiver of First Article Testing, Defective Supplies, and Subsequent Untimely Issues]. B-187705; B-188197. April 18, 1977. 7 pp.

Decision re: Julian A. McDermott Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Defense Supply Agency: Defense General Supply Center, Richmond, VA; Audi Industries, Inc.; All Bidders, Inc.

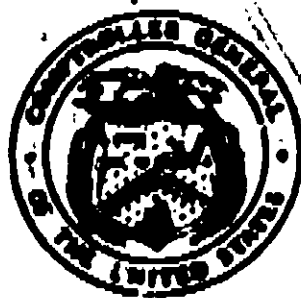
Authority: A.S.P.R. 1-902, 1-903, 1-904.1, 1-905.4. A.S.P.R. 1-705.4(c) (ii). 45 Comp. Gen. 4. 43 Comp. Gen. 257. 54 Comp. Gen. 66. E-183730 (1976). B-179719 (1974). B-179720 (1974). B-182890 (1975). 4 C.F.R. 20.2(b) (2).

A protest was made to the award of three contracts to other bidders, and, most importantly, to the finding that it was nonresponsible and was not allowed a preaward survey. No objection was found to agency's determination of nonresponsibility; consequently, a preaward survey was not required. Referral to the Small Business Administration was not required, as certificate of urgency had been duly executed. Protest of other bidder's responsibility was not for consideration. Protests against other bidders were untimely. (DJH)

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Keith Baker  
Proc. II

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

**FILE: B-187705, B-188197**

**DATE: April 18, 1977**

**MATTER OF: Julian A. McDermott Corporation**

**DIGEST:**

1. Information available to contracting officer regarding protester's obligations on existent contracts for same item was reasonable basis for contracting officer's determination that protester was not responsible bidder.
2. Presaward survey was not required where contracting officer had available sufficient information to determine protester's responsibility.
3. Contracting officer was not required to submit questions of protester's responsibility to Small Business Administration because certificate of urgency had been duly executed.
4. Agency determinations to waive first article testing for bidder are reviewed by GAO where bid standing is affected. However, where, as here, waiver of first article testing does not affect bid standing, GAO sees no need to consider whether waiver was justified.
5. Question of whether items supplied comply with contract specifications is matter of contract administration, and not for consideration under bid protest functions of this Office.
6. Subsequent protests filed more than ten days after protester knew or should have known of basis for protests are dismissed as untimely.

Julian A. McDermott Corporation (McDermott) protests the award of contracts DSA 400-77-C-0075, DSA 400-77-C-0689, and DSA 400-77-M-B100, issued by the Defense General Supply Center (DGSC), Richmond, Virginia. Each protest will be discussed separately below following the citation of the appropriate contract number.

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DSA 400-77-C-0075

The protester contests the determination by DGSC that McDermott was not a responsible bidder for the subject procurement. McDermott also contends that the successful bidder was not a responsible bidder; that DGSC should not have waived a first article testing requirement with respect to the successful bidder and that the articles supplied to the Government by the successful bidder contain defective components.

DGSC negotiated the subject procurement of 3,625 distress marker lights because of a critical stock position for such items. On September 10, 1976, DGSC issued an RFP to six potential offerors. Best and final offers were received from McDermott, Audi Industries, Inc. (Audi) and Hope Electronics. Following a preaward survey of Hope Electronics, the apparent low bidder, the contracting officer found it to be not responsible. McDermott was also determined to be not responsible, based upon information available to the contracting officer concerning McDermott's delinquent performance on existing contracts with DGSC for the same item. Following a preaward survey, Audi was determined to be responsible and award was made to it. McDermott has protested this award to our Office.

McDermott first asserts that the contracting officer's determination that it was not responsible was erroneous. The record indicates that the contracting officer based his determination upon information available to him that McDermott was delinquent on deliveries under four contracts with DGSC.

Contract DSA 400-75-C-5978, awarded to McDermott on June 25, 1975, called for delivery of 6,452 distress marker lights of the same type as are involved in the present contract. McDermott failed to meet the April, May and June delivery dates, following a fire at its plant on March 6, 1976. By October 8, 1976, when the contracting officer made his responsibility determination, McDermott had not yet made any deliveries. The agency states that on September 29, 1976, when McDermott was contacted regarding a proposed delivery schedule for this contract, it indicated that its delivery schedule would be from February through May 1977. The agency reports that McDermott was asked how it was able to meet the

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December 1976 and January 1977 delivery dates for the public exigency requirement when it was unable to deliver under the contract it already had until February through May 1977. McDermott indicated that earlier performance on the subject RFP would be accomplished at the expense of delaying delivery under the older contracts. McDermott states that it did not indicate that deliveries under the older contracts would be delayed but rather that the exigency requirement would be produced with overtime labor. McDermott explains that deliveries under the older contracts could not be similarly expedited by the use of overtime labor because the contract price was not sufficient to cover the added expense of such labor.

In addition to the above-mentioned contract, McDermott had also failed to make any deliveries under DSA 400-76-C-1473, executed October 15, 1975 for 1,475 units due August 2, 1976, and DSA 400-76-C-2746, executed January 5, 1976 for 1,500 units due June 3, 1976.

On the basis of the above information, the Defense Logistics Agency (DLA) asserts that the contracting officer was justified in concluding that McDermott could not meet its existing contractual obligations and at the same time comply with the delivery schedule required by the public exigency procurement. DLA further asserts that, but for McDermott's failure to deliver distress marker lights as required by existing contracts, the subject exigency procurement probably would not have been necessary.

Paragraph 1-902 of the Armed Services Procurement Regulation (ASPR) (1976 ed.) requires that contracts be awarded only to responsible prospective contractors. ASPR 1-904.1 precludes an award unless the contracting officer first makes an affirmative determination that the prospective contractor is responsible under the criteria set out in ASPR 1-903. Section (ii) of that paragraph states that a prospective contractor must:

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"(ii) be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing business commitments, commercial as well as governmental \* \* \*."

This Office has consistently held that it is the duty of the contracting officer to determine the responsibility of an offeror and that he is vested with a considerable degree of discretion in making this determination. We will not substitute our judgment in such cases unless the contracting officer's determination is shown to be without a reasonable basis. 45 Comp. Gen. 4 (1965); 43 id. 257 (1963). We find no basis in the record upon which to conclude that there was an abuse of administrative discretion. Consequently, we may interpose no legal objection to the contracting officer's determination that McDermott was not responsible for purposes of this procurement.

McDermott further asserts that it was prejudiced by the failure of the contracting officer to request a preaward survey prior to his determination as to McDermott's responsibility. Paragraph 1-905.4(b) of ASPR states that:

"A preaward survey shall be required when the information available to the purchasing office is not sufficient to enable the contracting officer to make a determination regarding the responsibility of a prospective contractor \* \* \*."

We have already determined that the evidence available to the contracting officer provided a reasonable basis for his determination that McDermott was not a responsible bidder. Consequently, a preaward survey was not required.

McDermott also asserts that it was prejudiced by not being given the opportunity to obtain a certificate of competency from the Small Business Administration (SBA). Paragraph 1-705.4(c)(ii) of ASPR provides that:

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"[a] referral need not be made to the SBA if the contracting officer certifies in writing, and his certification is approved by the chief of the purchasing office, that the award must be made without delay."

In the present case, a certificate of urgency was executed by the contracting officer on October 8, 1976 and was subsequently approved by the Director of Procurement and Production. Therefore, a referral to SBA of the question of McDermott's responsibility was not required.

McDermott next asserts that Audi, the successful bidder, was not a responsible bidder. This Office no longer reviews bid protests involving agencies' affirmative determinations of responsibility, except for actions by procurement officials which are tantamount to fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations of responsibility are based essentially on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. McDermott's protest does not allege that the contracting officer acted fraudulently or that definitive responsibility criteria were not applied in this case. Consequently, McDermott's assertion with regard to Audi's responsibility is not for consideration by this Office.

McDermott also asserts that DGSC should not have waived a first article testing requirement with respect to Audi. McDermott alleges that Audi's previous subcontractor, who supplied Audi with 90 percent of the components of the distress marker lights, was eliminating this product line approximately two months before the RFP closing date. We see no need to consider whether waiver was justified in this case. While we have reviewed agency determinations to waive first article testing in the past, we have done so where the determination to waive affected the relative standing of bidders. Our purpose in reviewing these determinations was to assure that the waiver, because of its impact on the bid evaluation, was not arbitrary or capricious. Kan-Du Tool & Instrument Corporation, B-183730, February 23, 1976, 76-1 CPD 121. Here Audi was

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the sole remaining bidder. Waiver of first article testing for Audi could not have affected the protester's competitive position. Under the circumstances, we see no reason to review the agency's determination to waive first article testing.

McDermott finally asserts that the articles supplied to the Government by Audi were defective. The question of whether the items actually supplied by Audi under the contract complied with the specifications is a question of contract administration. See Edward E. Davis Contracting, Inc., B-179719, B-179720, January 20, 1974, 74-1 CPD 37. Matters of contract administration are not for resolution under our bid protest procedures which are reserved for considering whether an award, or proposed award, of a contract complies with statutory, regulatory, and other legal requirements. See Inter-Alloys Corporation, B-182890, February 4, 1975, 75-1 CPD 79. These matters, rather, are the responsibility of the contracting agency. We note, however, that DLA has assured our Office that McDermott's allegation of defective units is being investigated by DLA.

DSA 400-77-C-0689

McDermott protests the award by DGSC of the referenced contract to Aall Bidders, Inc. (Aall) for the delivery of 230 electric floodlight sets. The record indicates that McDermott was notified of the proposed award to Aall by letter of December 17, 1976. McDermott's protest, dated January 17, 1977, was received by this Office on January 19, 1977.

The bid protest procedures of this Office provide that a bid protest should be filed in this Office not later than ten days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2). In the present case, McDermott should have known of the protest not later than December 24, 1976, when it may be presumed to have received notice of award of the subject contract. Because McDermott did not protest to this Office until January 19, 1977, more than ten days after it should have known of the basis of its protest, its protest is untimely. Accordingly, McDermott's protest under DSA 400-77-C-0689 is dismissed.

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A 400-77-M-B100

McDermott protests the award by DGSC of the referenced contract to Unity Manufacturing Company on November 19, 1976. McDermott was not formally advised that its offer had been rejected. However, a reference to the award was contained in a Freedom of Information Act request from McDermott, dated December 18, 1976. This reference makes it clear that McDermott was aware not later than December 18, 1976, that its offer had been rejected. Because McDermott did not protest to this Office until January 19, 1977, more than ten days after it knew of the basis of its protest, its protest is untimely. Accordingly, McDermott's protest under DSA 400-77-M-B100 is dismissed.

Deputy

*P. Z. K. Sullivan*  
Comptroller General  
of the United States